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No. 06-__

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the New Hampshire business profits tax regime facially discriminate against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the State, a restriction virtually identical to restrictions struck down by this Court in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and by state courts of North Dakota and California?

PARTIES TO THE PROCEEDING

The parties are as stated in the caption. In the Superior Court of Merrimack County, New Hampshire, the respondents were Stanley R. Arnold, Commissioner of New Hampshire Department of Revenue Administration and the New Hampshire Department of Revenue Administration.

RULE 29.6 STATEMENT

Petitioner has no parent corporation. There is no publicly held company that owns 10% or more of petitioner's stock.

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COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITION FOR A WRIT OF CERTIORARI

General Electric Company respectfully petitions this Court to grant a writ of certiorari to review the judgment of the Supreme Court of New Hampshire in this case.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire (App. 1a-21a) is reported at 914 A.2d 246. The orders of the Superior Court of Merrimack County, New Hampshire (App. 22a-43a; App. 44a-49a) are not officially reported.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on December 6, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const., art. I, § 8, cl. 3, provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Relevant portions of the New Hampshire statutes are set forth at App. 65a-72a.

STATEMENT

This case raises in the context of foreign commerce an issue that this Court and other state courts have previously addressed in the context of interstate commerce. The New Hampshire income tax regime at issue here grants a dividends received deduction to corporate shareholders of foreign corporations only to the extent the underlying corporation engages in in-state business activity. In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court held that a state intangibles tax regime granting a tax base deduction to corporate shareholders only to the extent the underlying corporation engaged in in-state business activity "facially discriminates against interstate commerce." *Id.* at 333. *Fulton* thus compels the conclusion that the New Hampshire regime impermissibly discriminates against foreign commerce. Moreover, every state court evaluating other States' tax regimes with deductions virtually identical to New Hampshire's, although applied with respect to domestic subsidiaries, has concluded that such regimes facially discriminate against interstate commerce.[1] The court below, however,

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[1] See *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004); *Ceridian Corp. v. Franchise Tax Bd.*, 102

viewed *Fulton* as "not analogous" (App. 20a) and simply did "not agree with [the] analysis" of the state courts that relied on *Fulton* in striking down admittedly "similar" regimes. App. 21a.

This case also raises a second issue that this Court has previously addressed in the context of interstate commerce. In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), this Court condemned a state tax regime granting a tax benefit for an interstate transaction with local attributes over a comparable interstate transaction without local attributes, because the regime "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335. The New Hampshire tax regime under consideration here likewise grants a tax benefit for foreign dividends with local attributes over comparable foreign dividends without local attributes. *Boston Stock Exchange* thus compels the conclusion that the New Hampshire regime impermissibly discriminates between two types of foreign transactions to favor local commercial interests over out-of-state business. The court below, however, while citing *Boston Stock Exchange* (App. 18a-19a), sustained the State's tax regime without explaining how its result can be squared with the rule of that case.

Simply put, the decision below resolves under the "foreign" Commerce Clause an issue this Court and other state courts have previously resolved differently under the "interstate" Commerce Clause.[2] In so doing, the court below has precipitated a conflict with several other state court decisions, as well as with decisions of this Court.

Cal. Rptr. 2d 611 (Cal. App. 2000); *D.D.I., Inc. v. State*, 657 N.W.2d 228 (N.D. 2003).

[2] If the commerce under consideration in these cases had been foreign rather than interstate, the taxing statutes at issue would have raised "foreign" rather than "interstate" Commerce Clause questions.

1. New Hampshire's Taxing Regime (1990-1999)

During the tax years at issue, New Hampshire imposed a business profits tax (BPT) at the rate of between 7 and 8 percent on the "taxable business profits" of every business organization. N.H. Rev. Stat. Ann. § 77-A:2. "Taxable business profits" is essentially federal taxable income, as modified by specified state adjustments and apportioned to the State. *Id.* § 77-A:1, III and IV. Although each taxable business organization ordinarily reports its own income on a separate basis, when a group of commonly controlled corporations engages in a unitary business, *i.e.*, a business characterized by economic interdependence, *id.* § 77-A:1, XIV, the unitary group reports its income to New Hampshire on the basis of combined reporting. *Id.* 77-A:1, XIII, XV, XVI. Under combined reporting, the income of the unitary group members is combined on a single return; intercompany transactions among group members (such as payment of dividends) are eliminated (*i.e.*, disregarded); and the resulting income is apportioned to New Hampshire by a formula reflecting the ratio of the group's property, payroll, and sales within the State to the group's property, payroll, and sales wherever located. *Id.* § 77-A:1, XVI, 77-A:3, 77-A:6, IV.

New Hampshire's combined reporting method does not apply to every member of the unitary group. If a unitary foreign corporation has 80 percent or more of the average of its payroll and property outside the United States, the corporation (hereinafter a "foreign subsidiary"[3]) is excluded from the combined report.[4] Instead, New Hampshire taxes such

[3] This is consistent with the usage throughout this litigation, although the statute denominates such corporations as Overseas Business Organizations. N.H. Rev. Stat. Ann. § 77-A:1, XIX.

[4] For this reason, the statute describes the unitary group that actually files on a combined basis in New Hampshire as the "water's edge combined group," N.H. Rev. Stat. Ann. § 77-A:1, XV, because the group stops at the water's edge insofar as foreign subsidiaries are concerned.

foreign subsidiaries under a "separate company" reporting method. Under the separate company reporting method, any foreign subsidiary that does business in New Hampshire files a separate return computing its own income properly apportioned to the State. Such income is subject to the BPT independently of the BPT imposed on the income of the combined group. If a foreign subsidiary does no business in New Hampshire, it does not file a separate return there.

If any foreign subsidiary pays a dividend to a member of the New Hampshire combined group, the foreign dividend payment is treated as a separate stream of taxable income to the group. N.H. Rev. Stat. Ann. § 77-A:3, II. Such separate treatment differs from the treatment of dividends paid by members of the combined group to one another. Those intragroup dividends are disregarded and eliminated from the group's income as intercompany items. The foreign dividends, by contrast, are separately apportioned to New Hampshire, and the apportioned amount is added to the group's combined income to determine the group's total income subject to the BPT.[5]

Finally, and for purposes of this case most importantly, if a foreign subsidiary pays a dividend to a member of the combined group *and the foreign subsidiary is engaged in business generating taxable income in New Hampshire*, the group's income (including the dividend) subject to the BPT is reduced by a dividends-received deduction (DRD) equal to the amount of taxable income the foreign subsidiary reported in New Hampshire on its separate return. N.H. Rev. Stat. Ann. § 77-A:4, IV; App. 10a-11a. By contrast, if the foreign subsidiary pays a dividend to a member of the combined group *and the*

[5] This separate category of income is described as "New Hampshire foreign dividends taxable business profits." App. 4a. The dividends are apportioned under the unitary group's formula, as modified to reflect the foreign subsidiary's non-New Hampshire apportionment factors. N.H. Rev. Stat. Ann. § 77-A:3, II(b).

foreign subsidiary is ***not*** *engaged in business in New Hampshire*, the group's income (including the dividend) subject to the BPT is fully taxed and no DRD is allowed.

2. Facts

As the court below explicitly recognized, "[t]he facts are not disputed by the parties." App. 9a; see also App. 6a (referring to "undisputed facts") and 21a.

a. GE and its Affiliates

General Electric Company (GE or petitioner) is a New York corporation with its principal offices in Connecticut. During the tax years at issue (1990-99), GE carried on extensive business activities throughout the United States, including New Hampshire. In addition to carrying on its own activities, GE was the common parent of numerous affiliated corporations, domestic and foreign, that carried on a wide range of business operations within and without the United States, including manufacturing, finance, broadcasting, and insurance. During each of the tax years, a portion of GE's business operations was conducted by foreign affiliates that did no business in New Hampshire or in any other State.

b. Taxation of GE and its Affiliates

Because it conducted business within New Hampshire, GE was required to file a New Hampshire BPT return and pay a BPT for each of the tax years at issue. In determining GE's BPT liability for the each of the tax years, GE and respondent agreed for purposes of this case only that GE and its affiliates should be treated as engaged in a "unitary business" within the meaning of the BPT statute, and that GE and its domestic unitary affiliates should be treated as one combined group (the "domestic combined group"). Accordingly, the income of the group members was combined, intercompany transactions (such as payment of domestic dividends) were eliminated, and the resulting income was apportioned to New

Hampshire by the three-factor formula reflecting the New Hampshire portion of the group's property, payroll, and sales.

Pursuant to New Hampshire's BPT statute, GE's foreign subsidiaries were excluded from the domestic combined group.[6] Under New Hampshire's regime, those foreign subsidiaries were each treated on a separate company basis, both with respect to their own BPT obligations and with respect to transactions with members of GE's domestic combined group. Because GE's foreign subsidiaries did no business in New Hampshire, they did not file their own BPT tax returns.

During each of the tax years at issue, certain of GE's foreign subsidiaries paid dividends to GE and other members of the domestic combined group (the "foreign dividends"). These dividends, as apportioned to New Hampshire, were added to the domestic combined group's income to determine the group's total BPT liability. Because GE's foreign subsidiaries did no business in New Hampshire, the statute denied GE's domestic combined group any DRD with respect to such dividends.

3. The Refund Claim

Respondent audited GE's BPT returns for the tax years at issue. Throughout the audit, GE consistently contended that allowing a DRD when a dividend-paying foreign subsidiary conducts business in New Hampshire, but denying a DRD with respect to its dividend-paying foreign subsidiaries because they conducted no business in the State, facially discriminated against foreign commerce in violation of the Commerce Clause. Respondent rejected GE's contention, but executed two settlement agreements with GE preserving this constitutional issue for appeal. The parties agreed that "GE would receive a refund of approximately $3.15 million should the foreign dividend deduction issue be resolved in GE's

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[6] See pp. 4-5.

favor." App. 2a. GE filed a timely request for a refund based on its constitutional claim, which respondent's hearing officer denied because he lacked power to decide whether the state statute violates the federal Constitution.

4. The Proceedings Below

GE timely appealed to the New Hampshire Superior Court. GE claimed, among other things, that the New Hampshire statute should be invalidated because it discriminates against foreign commerce in violation of the Commerce Clause. The court ruled against GE on the merits.

GE appealed to the New Hampshire Supreme Court. After disposing of preliminary state law issues that are no longer in dispute, that court turned to the "central issue in this case," (App. 12a), whether the DRD "facially discriminates against foreign commerce by permitting a deduction for dividends received from foreign corporations doing business in New Hampshire, while denying a deduction for dividends received from foreign corporations not doing business in New Hampshire." App. 12a.

Rather than addressing GE's straightforward comparison between dividends received from (a) foreign subsidiaries doing business in the State and (b) foreign subsidiaries not doing business in the State, the New Hampshire court instead characterized the issue before it as one involving an examination of the State's "taxing regime as a whole" (App. 17a) and "the aggregate tax assessed against the unitary business in New Hampshire." App 21a. Under this approach, the court was able to reject GE's claim of discrimination because the "aggregate" BPT on the foreign subsidiary itself *and* on the dividends it paid to the combined group would be greater (even with the DRD) when the subsidiary conducted business and generated taxable income in the State than when it did not conduct business in the State.

The difference between the two approaches may be illustrated as follows:

GE's Comparison		
BPT paid by combined group on dividends received from foreign subsidiary **not** doing income-generating business in New Hampshire	v.	BPT paid by combined group on dividends received from foreign subsidiary doing income-generating business in New Hampshire
New Hampshire Supreme Court's Comparison		
BPT paid by foreign subsidiary **not** doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary	v.	BPT paid by foreign subsidiary doing income-generating business in New Hampshire *and* BPT paid by combined group on dividends received from such subsidiary

As support for its "aggregate" approach, the New Hampshire court relied heavily on a footnote in this Court's decision in *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992). *Kraft* involved Iowa's separate company reporting regime applicable to all corporations doing business in that State. In *Kraft*, this Court struck down as facially discriminatory the DRD that Iowa provided for dividends received from domestic subsidiaries, but not for dividends received from foreign subsidiaries. In the course of its opinion, this Court in footnote 23 addressed the proper basis for determining whether there was impermissible discrimination:

> If one were to compare the aggregate tax imposed by Iowa on a unitary business which included a subsidiary doing business throughout the United States (including Iowa) with the aggregate tax imposed by Iowa on a unitary business which included a foreign subsidiary

> doing business abroad, it would be difficult to say that Iowa discriminates against the business with the foreign subsidiary. Iowa would tax an apportioned share of the domestic subsidiary's entire earnings, but would tax only the amount of the foreign subsidiary's earnings paid as a dividend to the parent.
>
> In considering claims of discriminatory taxation under the Commerce Clause, however, it is necessary to compare the taxpayers who are "most similarly situated." A corporation with a subsidiary doing business in Iowa is not situated similarly to a corporation with a subsidiary doing business abroad. In the former case, the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary. A more appropriate comparison is between corporations whose subsidiaries do not do business in Iowa.

Kraft, 505 U.S. at 80 n.23 (citation omitted).

Based on footnote 23, the court below proceeded to "assess New Hampshire's taxing regime as a whole and look at the aggregate tax imposed upon a unitary business." App. 17a. Using this approach, the court found "no improper discriminatory treatment." *Id.* As the court saw it, taxing a foreign subsidiary doing business in New Hampshire on its own business profits, and permitting a DRD for any dividends paid by that subsidiary, up to the amount of its business profits that were separately taxed, ensured that "the income of the business entity is taxed only once." App. 18a. By contrast, because a foreign subsidiary that conducts no business in New Hampshire pays no tax on its business profits, its apportioned dividends are properly taxable without a DRD "because that dividend income has been taxed only once." *Id.*

The court acknowledged that several other state courts have reached a contrary result with respect to domestic subsidiary DRDs limited in the same manner as New Hamp-

shire's. It stated simply that "we do not agree with their analysis." App. 21a. The court also gave limited attention to this Court's decision in *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996). In the court's eyes, the critical difference between the two cases was that the state tax regime in *Fulton* "taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" (App. 20a), whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." App. 20a (emphasis in original).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two compelling reasons. First, the decision below has created a clear conflict with the decision of another state court of last resort, and with the decisions of other state courts as well, over the important federal question whether a State may limit deductions for dividends received to those received from corporations doing business in the State. Second, the decision below cannot be reconciled with two decisions of this Court—*Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), and *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977)—that found tax regimes to be unconstitutionally discriminatory under the interstate Commerce Clause for reasons that apply with even greater force to New Hampshire's tax regime under the foreign Commerce Clause.

I. THE DECISION BELOW CREATES A CLEAR CONFLICT BETWEEN DECISIONS OF STATE COURTS OF LAST RESORT

In upholding a DRD limited to dividends received from corporations doing business and generating taxable income in the State, the New Hampshire Supreme Court has created a clear conflict with the decision of another state court of last resort on an important federal question. In *D.D.I., Inc. v.*

State ex rel. Clayburgh, 657 N.W.2d 228 (N.D. 2003), the North Dakota Supreme Court struck down as unconstitutionally discriminatory a DRD that in all essential respects was identical to New Hampshire's. North Dakota provided a DRD equal to the amount of "the dividend payor's income . . . subject to North Dakota corporate income tax," *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire provides a DRD equal to "the amount of business profits already taxed by the state." App. 11a. North Dakota denied a DRD for dividends received from corporations doing no business in North Dakota, *D.D.I.*, 657 N.W.2d at 233, just as New Hampshire denies a DRD for dividends received from foreign corporations doing no business in New Hampshire. The North Dakota court concluded that a DRD linked to the in-state of activity of the dividend payor "impermissibly discriminates against interstate commerce," *D.D.I.*, 657 N.W.2d at 235. The New Hampshire court "found no improper discriminatory treatment" in an identical DRD. App. 17a. It would be difficult to find a starker conflict between decisions of state courts of last resort.

The decision below is also in conflict with a series of California Court of Appeal decisions that have invalidated DRDs virtually identical to New Hampshire's. Thus, in *Farmer Bros. Co. v. Franchise Tax Bd.*, 134 Cal. Rptr. 2d 390 (Cal. App. 2003), *rev. denied* (Cal. Aug. 27, 2003), *cert. denied*, 540 U.S. 1178 (2004), the court found that California's DRD "is discriminatory on its face because it affords to taxpayers a deduction for dividends received from corporations subject to tax in California, while no deduction is afforded for dividends received from corporations not subject to tax in California." *Id.* at 398. Accord, *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d 41 (Cal. App. 2004), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611 (Cal. App. 2000).

The court below half-heartedly sought to distinguish the North Dakota and California decisions by conjecturing that "it may be that in those cases, there was no taxing symmetry as there is here." App. 21a. The court's imagined distinction lacks any foundation in fact. Precisely the same "symmetry" existed in the North Dakota and California cases, namely, the income in question was taxed only once, either to the parent (in the form of dividends) or to the taxable subsidiary. Indeed, this was precisely the basis on which the taxing authorities in those cases sought to defend the taxes. *See, e.g., D.D.I.*, 657 N.W.2d at 233 ("The [dividends received deduction] insures that, in the end, there is only one level of North Dakota income tax on North Dakota income"); *Farmer Bros.*, 134 Cal. Rptr. 2d at 396-97 ("The purpose of [the statute] is to prevent the imposition of a second tax upon the stream of income leading to the dividend") (internal quotation marks omitted). Both the North Dakota and California courts roundly rejected the "taxing symmetry" justification.

More candidly, the court below recognized that its decision was creating a conflict with the decisions of other state courts. Regardless of any purported factual basis for distinguishing the decisions of the other state courts, the court below declared flatly that "we do not agree with their analysis." App. 21a.

In short, the decision below has precipitated a clear and irreconcilable conflict with another state court of last resort and with other important state courts as well. This Court should grant certiorari to resolve the conflict on this significant issue.

II. THE DECISION BELOW CONFLICTS WITH SETTLED DECISIONS OF THIS COURT

The decision below is incompatible with two decisions of this Court.

A. *Fulton Corp.* v. *Faulkner*

In *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996), this Court considered a North Carolina intangible property tax as applied to taxpayers who owned corporate stock. The tax was imposed at the rate of 0.25 percent of the fair market value of the stock. The value of the stock assessed under the tax, however, was reduced by a deduction equal to the percentage of the corporation's income subject to tax in North Carolina. Under this regime, the stock of a corporation doing all of its business in North Carolina would be subject to no intangible tax; the stock of a corporation doing 50 percent of its business in North Carolina, would be subject to tax on 50 percent of the stock's value; and the stock of a corporation doing none of its business in North Carolina would be subject to tax on 100 percent of its value. This Court had no hesitation in branding North Carolina's taxing scheme as "facially discriminatory" (*id.* at 333):

> A regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.

Id.

New Hampshire's DRD suffers from the same constitutional infirmity that afflicted the North Carolina taxing regime. Just as North Carolina's regime facially discriminated against interstate commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engaged in in-state business activity, so New Hampshire's tax regime facially discriminates against foreign commerce by providing a tax deduction for corporate shareholders only to the extent the underlying corporation engages in in-state business activity. In both cases, the regime favors corporations engaging in local activity over their out-of-state

competitors and tends to discourage corporations from plying their trades in protected commerce, whether interstate or foreign.

The fact that New Hampshire's regime facially discriminates against foreign commerce whereas North Carolina's regime discriminated against interstate commerce provides no basis for distinguishing the New Hampshire DRD under the Commerce Clause. This Court has made it clear that the protection afforded by the dormant Commerce Clause to foreign commerce "is broader than the protection afforded to interstate commerce," *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992). *See also Japan Line, Ltd., et al.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). Hence, there is an even more compelling Commerce Clause objection to New Hampshire's taxing scheme than to North Carolina's.

The court below claimed that *Fulton* was "not analogous to the present case" (App. 20a) because in *Fulton* "the state taxing regime taxed stock ownership and treated in-state stock more favorably than stock held in out-of-state corporations" *id.*, whereas in the instant case, the state was "taxing a proportionate share of dividend *income* coming into the state." *Id.* (emphasis in original). But the court did not explain why discrimination in favor of in-state activity under an income tax is any more tolerable under the Commerce Clause than discrimination in favor of in-state activity under an intangible property tax. Indeed, the state courts that have uniformly invalidated DRDs similar to New Hampshire's have found this Court's analysis in *Fulton* controlling. *See D.D.I.*, 657 N.W.2d at 231-32 (discussing and applying *Fulton*); *General Motors Corp. v. Franchise Tax Bd.*, 16 Cal. Rptr. 3d at 57 (same), *aff'd in part and rev'd in part on other grounds*, 47 Cal. Rptr. 3d 233 (Cal. 2006); *Farmer Bros.*, 134 Cal. Rptr. 2d at 318 (same); *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d at 619 (same).

B. *Boston Stock Exchange* v. *State Tax Commission*

The decision below is also inconsistent with this Court's decision in *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977). There, this Court considered a New York stock transfer tax scheme that provided, *inter alia*, a reduced tax on certain stock transfers by nonresidents through New York transfer agents when the stock sale was effected on a New York-based stock exchange rather than on an out-of-state exchange. This Court held the scheme violated the Commerce Clause because it granted a tax benefit for an interstate transaction with local attributes but not for a comparable interstate transaction without local attributes. The taxing scheme was objectionable because it "discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state businesses." *Id.* at 335.

New Hampshire's DRD contains the same constitutional flaw as New York's stock transfer tax regime. Just as New York's regime favored local commercial interests by reducing the tax on interstate stock transfers with a local flavor, so New Hampshire favors local commercial interests by reducing the tax on foreign dividend payments with a local flavor. If New York may not reduce its tax on interstate commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable stock transfer be the product of a New York sale), surely New Hampshire may not reduce its tax on foreign commerce by tying the reduction to the conduct of local business activity (having one's otherwise taxable dividend emanate from a New Hampshire-taxpaying foreign subsidiary). As with *Fulton*, the fact that the New Hampshire regime discriminates against foreign commerce whereas New York's regime discriminated against interstate commerce only strengthens the force of the Commerce Clause objection to New Hampshire's taxing scheme vis-a-vis New York's. Although the court below cited *Boston Stock Ex-*

change, App. 18a-19a, it made no effort to explain how its decision could be reconciled with the rationale of that case.

C. *Kraft* Provides No Basis for Disregarding *Fulton* and *Boston Stock Exchange*

The attempt of the New Hampshire court to sidestep the inconsistency of its conclusion with *Fulton* and *Boston Stock Exchange* rests on its misguided reliance on this Court's footnote 23 in *Kraft*. The court below read this footnote as authorizing consideration of "the aggregate tax imposed upon a unitary business," App. 17a, including the tax imposed on *both* the dividend recipient *and* the dividend payor. In so concluding, the court below completely misread and misapplied footnote 23.

Indeed, the New Hampshire court's "aggregate tax" analysis makes precisely the same mistake that this Court identified in footnote 23. There, this Court considered, in the context of Iowa's separate company reporting regime, an attempt to defend that State's discriminatory DRD provision with assertions that the "aggregate tax" on a parent with a domestic subsidiary doing business in Iowa might not always be less than the "aggregate tax" imposed by Iowa on a parent with a dividend-paying foreign subsidiary not doing business in Iowa. This Court rejected that defense by noting that it was inappropriate to include the Iowa tax imposed on the domestic subsidiary's earnings in the comparison analysis because "the Iowa operations of the subsidiary provide an independent basis for taxation not present in the case of the foreign subsidiary." *Kraft*, 505 U.S. at 80 n.23. This Court concluded that the "aggregate tax" comparison offered by the State (and by the United States as *amicus curiae*) failed to compare taxpayers who are "most similarly situated." *Id.* In order to avoid including income for which there was an "independent basis for taxation" under Iowa's separate company reporting regime, this Court held that the "more appro

priate comparison is between corporations whose subsidiaries do not do business in Iowa." *Id.*

New Hampshire's tax regime imposes tax liability on domestic combined groups, on the one hand, and foreign corporations, on the other, as separate filing entities. A combined group doing business in New Hampshire files a return with the State, and any foreign corporation doing business there files its own separate return with the State. If the court below had adopted a proper reading of *Kraft*'s footnote 23, it would have concluded that the most similarly situated taxpayers for comparison purposes in this case are two domestic combined groups that do business in New Hampshire, one with a foreign subsidiary that also does business in New Hampshire and files a separate return there, the other with a foreign subsidiary that does not do business in the State. Assuming both foreign subsidiaries pay the same amount of dividends to their respective parent companies in a given year, the appropriate calculation would show that the total tax imposed on the combined group whose foreign subsidiary does business in the State will always be less than the total tax imposed on the combined group whose foreign subsidiary does not do business in the State. The reason for that is New Hampshire's discriminatory DRD, which is available to the combined group only to the extent that a dividend-paying foreign subsidiary generates taxable income in the State.

What would be *inappropriate* under *Kraft* in making the necessary comparison here would be to compare the "aggregate" New Hampshire tax liabilities of *both* the combined groups *and* their respective foreign subsidiaries. Yet, that is exactly what was done by the court below. Because there is as much of an "independent basis" for New Hampshire to tax the income of a foreign subsidiary doing business in the State as there was for Iowa to tax the income of the domestic subsidiary referenced in footnote 23, the decision of the court below to include the New Hampshire tax on the foreign

subsidiary's income in its "aggregate tax" calculation is directly contrary to this Court's teachings in *Kraft*.

In short, *Kraft* reinforces petitioner's position regarding the appropriate comparison for determining discrimination in this case, and it provides no basis for the New Hampshire Court's disregard of the controlling force of *Fulton* and *Boston Stock Exchange*.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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